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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2007
WAC 05 236 52715

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a photographer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner does not qualify for classification as an alien of exceptional ability and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement. The director's decision confuses the issue of exceptional ability with the national interest waiver request and at times appears to be applying the standard from a higher classification. Moreover, the director's decision appears to include boilerplate language discussing evidence that was not submitted in this matter, such as professional memberships and reference letters. Nevertheless, the director raises valid concerns that the petitioner has not overcome on appeal. Thus, we uphold the director's ultimate decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The director listed the six criteria and then stated:

> Although the evidence presented may satisfy three of the preceding six criteria, simply meeting these criteria does not necessarily qualify the self-petitioner as an alien of exceptional ability. These criteria are merely [Citizenship and Immigration Service's] guide to help petitioners establish that the beneficiary is a person with a degree of expertise above that ordinarily encountered in the sciences, arts or business.

The director then went on to discuss the national interest waiver although that discussion includes some discussion of the requirements for exceptional ability as well, confusing the two issues. Specifically, the director stated that the regulatory criteria are categories of evidence rather than specifications of the type of evidence that automatically prove eligibility for exemption of the requirement of a job offer. The regulatory criteria, however, relate to whether the alien qualifies for the classification sought, a classification that normally requires an alien employment certification approved by the Department of Labor (job offer). There are no regulatory criteria for the national interest waiver of the job offer requirement. Rather, the national interest waiver is a separate issue that we will discuss below.

While we may not agree with the exact wording in the director's decision, we do not read the director's decision as concluding that the petitioner was eligible for classification as an alien of exceptional ability under the regulations but that the petition was not approvable. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." Thus, a more rational interpretation of the director's decision is that the petitioner submitted documentation that related to or addressed three criteria, but that the evidence itself did not demonstrate a degree of expertise above that ordinarily encountered.

As discussed in the above paragraph, a petitioner cannot establish eligibility for this classification merely by submitting evidence that simply *relates* to at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with a degree of expertise above that ordinarily encountered. The petitioner has never expressly stated which criteria she claims to meet. The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

The biography of the petitioner in her book provides that she "graduated from [the] Department of Photography of Xi'an Fazhi College in 1983." The book does not reflect what degree she received and the record does not contain any degrees. The regulation at 8 C.F.R. § 103.2(b)(2) requires the

submission of primary evidence unless that evidence is shown to be non-existent or unavailable. The petitioner has not demonstrated that her degree is non-existent or unavailable. As such, we cannot consider the claims set forth in the biography in her book, which displays no International Standard Book Number (ISBN) number and is itself of dubious origin.

Regardless, section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university, school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, even if the petitioner had demonstrated that she had a degree, she would also have to demonstrate that her degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

In light of the above, the petitioner has not demonstrated that she meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner initially submitted an "Affidavit of Translation of Foreign Document" certifying the translation of an "Employment Certificate issued by Hengshui Yilinyuan Arts & Crafts Co., Ltd. regarding [redacted]" The petitioner is not [redacted] and the record does not contain the translation of this employment certificate or the original foreign language document. In response to the director's request for additional evidence, the petitioner submitted an October 2000 certificate from the China Photography Newspaper stating that the petitioner had been "employed as the general leader of 'China Photography Acknowledgement Forum,['] also employed as China Photography Newspaper main advisor." A certificate of unknown origin asserts that the petitioner worked as a main photographer from 1985 through 1998 at the Little Angel Children Art Photography Company. Finally, the Shan Xi Photography Committee purports to confirm the petitioner's photography career of "more than 20 years."

The director accepted that the petitioner has more than 20 years of experience as a photographer. The evidence submitted, however, is not the type of evidence mandated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) to meet this criterion. That regulation provides that the evidence must consist of letters from current or former employers. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence relating to experience "shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address and title of the writer, and a specific description of the duties performed by the alien." Only if such evidence is unavailable will other evidence be "considered." The certificate from the China Photography Newspaper does not specify when or for how long the petitioner worked there. The certificate regarding the Little Angel Children Art Photography Company is of an unknown origin and, thus, cannot be considered to be from a former employer. Finally, the record does not establish that the Shan Xi Photography Committee is confirming 20 years of employment with their committee. Thus, their certificate is also not from a former employer.

In light of the above, the petitioner has not submitted the evidence mandated by the regulations for this criterion and has not established that such evidence is unavailable. Thus, the petitioner has not established that she meets this criterion.

A license to practice the profession or certification for a particular profession or occupation

The petitioner submitted no evidence relating to this criterion and has never contested the director's conclusion, stated in the request for additional evidence, that this criterion does not apply to her field of photography.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

As stated above, the petitioner submitted a certificate of unknown origin purporting to confirm her employment at the Little Angel Children Art Photography Company. This certificate also states that the petitioner's "salary compare to others are higher few times [sic]." Without evidence of origin, the certificate has little evidentiary value. Moreover, the information is too vague. Without evidence of the petitioner's actual wages and data demonstrating the average wages for a photographer in China for comparison, we cannot determine whether the petitioner meets this criterion.

Evidence of membership in professional associations

The director indicates that the petitioner listed associations or organizations of which she is a member but concluded that she had not established that the membership is limited to individuals who demonstrate "outstanding achievement." Nothing in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) suggests that the professional associations must require outstanding achievements of their members. *Cf.* 8 C.F.R. § 204.5(h)(3)(ii) (relating to aliens of extraordinary ability; 8 C.F.R. § 204.5(i)(3)(i)(B) (relating to outstanding researchers). That said, the membership must still be somewhat restrictive if the membership is to be considered indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field.

Despite the director's apparent finding that the petitioner submitted evidence of memberships, however, the record lacks evidence that the petitioner is a member of a professional photography association. The nature of the "forum" for which she is alleged to have served as a general leader is undocumented.

In light of the above, the petitioner has not demonstrated that she meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner submitted certificates purporting to confirm the following achievements:

1. Year of 2000 China Best Sculpture and Best View Photography, China Photography Committee;
2. First Prize in the Fifth National Photography Competition from the Chinese Photographer Committee, May 10, 2001;
3. Gold Medal at the 2002 National Chinese Beauty Sculpture Photography Competition, organizer unspecified.
4. Listing on the "Elite of Chinese Photographer," confirmed by the Chinese Photographer Committee on November 8, 2002;

Of the certificates where the awarding authority is identified, it is always the Chinese Photographer Committee or the China Photography Committee, which may or not be the same committee as we are relying on translations. In the request for additional evidence, the director specifically requested evidence of the standing of the Chinese Photographer Committee and the significance of the awards. The petitioner's response did not include any evidence regarding the significance of this committee. The petitioner also failed to submit evidence of the significance of these awards, such as evidence that the selection of awardees is reported in significant trade journals or the general media or that a significant monetary prize or honor (such as display in an important museum) is the result of winning.

The director concluded that the awards were all academic and limited to scholars. The record contains no such suggestion. Nevertheless, the director's implication that the petitioner had not demonstrated the significance of these awards as specifically requested in the request for additional evidence is valid. Without evidence as to the significance of the committee that issued the awards and the awards themselves, we cannot conclude that the petitioner meets this criterion.

As the petitioner has not demonstrated that she is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was a basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must

> make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, photography. The director then concluded that the petitioner had not established how the proposed benefits of her work would be national in scope. On appeal, the petitioner asserts:

> From the contribution of the petitioner in the field of photography, it is very clear that she is at the very top of the field of photography and surely will benefit the United States of America. Only a few photographers' books could be selected for educational use in the famous Beijing Film [University]. So obviously it is clear she would serve the national interest to a level so great that would justify getting a job in US if she would like to get one. And she could survive well to be self-employed.

The proposed employment listed on the petition is photographer. In response to the director's request for additional evidence, the petitioner submitted a letter from an illegible author, not on company letterhead, purporting to "certify" that The Huans Nationwide Inc. is offering the petitioner a position as a photographer. The company's business includes advertising and design services. The author of the letter does not explain how this proposed employment will have a benefit to the national interest that is national in scope.

Matter of New York State Dep't of Transp., 22 I&N Dec. at 217, n.3, the AAO provided several examples of employment that, while having intrinsic merit, would provide benefits so attenuated at the national level as to be negligible. The examples consisted of a pro bono lawyer, an elementary school teacher and a restaurant chef. We concur with the director that the petitioner has not

established that the benefits of her proposed employment as a photographer for an advertising and design company of unknown size and reputation would be national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted the above-mentioned certificates purporting to establish the employment and recognition discussed above. In addition, the petitioner submitted copies of the cover page and introduction to "Text Book of Beijing Film University for Photography Project," authored by the petitioner. While the translation lists the Liaoning Arts Publishing House as the publisher, the copy of the original Chinese cover page shows no ISBN number, present on all formally published books. The biography of the petitioner references another book, *Discovery of the Skills of Photography*, which purportedly won "the second prize in the year of 2000 by Broadcasting Department." The record contains no evidence of this other book or the award it purportedly received.

The director noted the lack of evidence that the petitioner's book had been widely distributed or that the petitioner had influenced other photographers and was held in high esteem in the field. On appeal, the petitioner asserts, as quoted above, that her book was selected as a text for the Beijing Film University. The record, however, does not satisfactorily establish that the petitioner's book is used as a textbook at the Beijing Film University. For example, the record does not include letters from officials at the university confirming their use of the petitioner's book. It remains, while the Chinese Photography Committee has recognized the petitioner's photographs, the record is absent evidence that the petitioner has impacted the field of photography as a whole.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job

offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.